

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>v.</b>	)	<b>Criminal Action No. 06-42</b>
	)	<b>Civil Action No. 09-237</b>
<b>HERBERT BALLARD,</b>	)	
	)	<b>Electronically Filed</b>
<b>Defendant/Petitioner.</b>	)	

**MILLER NOTICE AND ORDER**

**TO THE PETITIONER IN THE ABOVE ACTION:**

You have filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, which has been filed at the above referenced docket numbers. You are hereby notified that federal law requires that you include all of your federal constitutional claims challenging a specific conviction and sentence in one habeas corpus petition pursuant to 28 U.S.C. § 2255.

The United States Court of Appeals for the Third Circuit held, in United States v. Miller, 197 F.3d 644 (3d Cir. 1999), that when the United States District Court receives a pro se petition challenging an inmate's conviction or incarceration, whether the petition is titled or styled as a "Motion under section 2255" or something else, the District Court should issue a notice to the petitioner explaining the effect of his motion or petition. This Miller notice should advise the petitioner of the following:

- (1) petitioner can have the motion ruled upon as it has been filed;
- (2) if the petition or motion is not styled as a section 2255 motion, this Court can recharacterize it as a section 2255 motion and hear it as such, but in that case, petitioner will lose the ability to file a second and successive petitions absent

certification by the Court of Appeals; or

(3) petitioner may withdraw the motion, and file one all-inclusive section 2255 petition within the one-year statutory period under the Antiterrorism Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244.

This same notice applies to a pro se petition filed by a state prisoner pursuant to 28 U.S.C. § 2254. Mason v. Meyers, 208 F.3d 414, 418 (3d Cir. 2000).

In other words, if this Court considers and denies your motion as filed and rules on the claims you raise in your motion on the merits, you will not be able to file a second or subsequent petition at a later time challenging the same conviction and sentence on other grounds, absent exceptional circumstances and the issuance of a certificate of appealability by the United States Court of Appeals for the Third Circuit.

You are hereby directed to consider this Notice, and to make an election how you want to proceed with your petition.

Accordingly,

**AND NOW, this 26th day of February, 2009**, it is **HEREBY ORDERED** that petitioner, Herbert L. Ballard, shall file a “Statement of Intent” on or before **April 8, 2009**, setting forth his intention to either: (1) have his motion ruled upon as filed (and lose his ability to file a second or successive petitions absent certification by the court of appeals), or (2) withdraw his motion, in which case he may file one all-inclusive section 2255 petition subject, however, to the one-year statutory period prescribed by AEDPA in section 2255.

If petitioner elects to withdraw his current motion and intends to file one all-inclusive section 2255 motion raising additional grounds, the time for filing such all-inclusive section 2255 petition will be tolled for an additional 120 days from the date he files his Statement of Intent making such election. United States v. Miller, 197 F.3d at 653. (This Court does not read Miller, however, as reviving any claims that already may have been extinguished as untimely or as foreclosing the Government's right to challenge any additional claims raised therein as untimely.)

In the event petitioner does not file his Statement of Intent on or before **April 8, 2009**, this Court will proceed to determination of the current motion as filed.

s/ Arthur J. Schwab  
Arthur J. Schwab  
United States District Judge

cc:  
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